REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 86 OF 2014

CHEBUT TEA FACTORY LIMITED.....APPELLANT

VERSUS

ERICK KIPKOECH LANGAT .....RESPONDENT

(Being an Appeal from the Judgment of the Principal Magistrate Honourable G. Adhiambo in Kapsabet PMCC No. 174 of 2012, dated 12th June, 2014)

JUDGMENT

This appeal arises from the judgment of *Hon. G. Adhiambo*, Senior Resident Magistrate, Kapsabet Law Courts delivered on 12th June 2014 in PMCC No. 174 of 2012. The magistrate entered judgment for the plaintiff against the defendant as follows;

i. That the defendant was 100% liable for the plaintiff's injuries.

ii. That the defendant was liable in general damages of Kshs. 250,000/= to the plaintiff.

iii. The damages were less Kshs. 20,830/= compensation as well as less Kshs. 19,745/= in Defendant's costs in SRMCC No. 187 of 2012.

iv. The total amount payable was Kshs. 209,425/=

The plaintiff/respondent had commenced proceedings in the lower court vide a plaint dated 7th February 2012 in which he prayed that judgment be entered against the defendant/appellant for negligence and/or breach of statutory duty and/or breach of contract of employment.

His prayers were for;

i. General damages

ii. Special damages in Kshs. 3000/=

iii. Costs of the suit.

iv. Interest on the above.

v. Any other relief that the court would deem fit to grant.

The plaintiff/respondent called 3 witnesses in support of his case.

PW1 was the plaintiff, *Erick Kipkoech Langat*. He was an employee at the defendant/appellant's premises at the time the cause of action arose. His work entailed grinding tea leaves. He was feeding tea leaves into the grinding machine on 12th January 2010 at 3:00 am when the accident happened. The conveyor belt, which was not guarded at the time, clipped his finger causing deep cut on the finger.

He claims that the gloves he had been issued with 3 months earlier were torn. Proof of issuance was evidenced through D exhibit 1 which showed that the plaintiff had been issued with aprons, dust coats and gloves.

He was attended to in the first aid room before being taken to Moi Referral and Teaching Hospital the next morning for specialized treatment. He was issued with prescription form (herein marked as PMFI -1). He was later treated at Kapsabet District Hospital and subsequently issued with treatment card/sheet (herein marked as PMFI - 2).

He was examined by *Dr. Kilel* (PW2) at the Kapsabet District Hospital who prepared a medical report dated 12th January 2012. The report is marked as PMFI - 3.

His advocate wrote a demand letter to the defendant/appellant on 25th January 2012 but was never responded to. The letter was produced before court and marked as P exhibit 4.

A notice of injury was filled as LD104 and produced before court as P exhibit 5. The notice of injury indicated that the percentage of incapacity was at 52%.

As proof that the plaintiff was indeed an employee of the defendant company, he produced his employment card, marked as P exhibit 6.

He was paid Kshs. 26,830/= which he feels is not commensurate to the injury sustained.

PW 2 was *Tom Kipkosgei Kilel,* a registered clinical officer working at Nandi Hills District Hospital but was working at Kapsabet District Hospital at the time the plaintiff was injured. He examined the plaintiff and prescribed antibiotics and analgesics to the patient. He recommended that further X-ray tests be carried out on the injured finger, an exercise that was carried out by his colleague, *Mr. Ruto* who worked at the orthopaedic clinic. The X-ray tests were done on 25th January 2010. The plaintiff had a septic wound. *Dr. Kilel* prepared a medical report, 2 years later when the plaintiff went back for further treatment. The medical report was produced before court and marked as PMFI – 3, which is dated 12th January 2012.

PW- 3 was *Alex Lugaloo* who was a general worker at the defendant factory at the time of the alleged accident. He was however not with the plaintiff during the incident as they were working on different floors. He was working on the 2nd floor while the plaintiff was on the 1st floor. He heard a commotion at around 3:00 am and rushed to the first aid room where he found the plaintiff being attended to after being injured. Later that morning, he was taken to Kapsabet District Hospital but the doctor was absent. He was taken back to the factory. Later arrangements were made to have him taken to Moi Teaching and Referral Hospital. PW-3 did not however accompany the plaintiff to the said hospital.

PW- 3 further contended that the conveyor belt wasn't guarded with metal bars on either side. He affirmed that there was the imminent risk of injury if the feeder wasn't careful. He averred that the plaintiff had gloves but they were torn. He produced his employment card as proof that he was indeed an employee of the defendant's factory.

The defence called one witness, *Carolyne Chepkemboi Maritim* who was the Production Clerk at the Defendant's factory. She deals with workers, especially when they sustain injuries in the course of their work until they are fully compensated. All injuries are reported to her. She stated that when the injury is a minor, the patient is taken to Kapsabet District Hospital; if it is a major one, the patient is transferred to Moi Teaching and Referral Hospital.

She confirmed that the plaintiff was issued with leather gloves, apron and dust coats on 2nd October 2009. This was evidenced by a store pin card marked as D exhibit 1.

She averred that the plaintiff was compensated an amount totaling up to Kshs. 26,830/=. The cheque dispatch number was produced and marked as D exhibit 2.

At the close of proceedings, the court entered judgment in favour of the plaintiff as follows;

i. That the defendant is 100% liable

ii. That general damages be set at Kshs. 250,000/=

iii. Special damages set at nil

iv. Less compensation Kshs. 20,830.

v. Less defendants costs in SRMCC No. 187 of 2012 Kshs. 19,745.

vi. Total amount payable Kshs. 209,425.

Being dissatisfied with the said decision, the defendant appealed against the same on the following grounds;

1. That the learned trial magistrate erred in law and fact in failing to dismiss the Respondents suit in the lower court as he had not proved his case on a balance of probability.

2. That the learned trial magistrate erred in law and fact in holding the appellant 100% liable for the alleged accident when there was no sufficient evidence to that effect.

3. That the learned trial magistrate erred in law and fact in failing to hold the respondent wholly and/or substantially liable for the alleged accident.

4. That the learned magistrate erred in law and fact by failing to evaluate the injuries sustained by the respondent as evidenced on the medical chits and/or reports.

5. That the learned trial magistrate erred in law and fact in making an award in general damages of Kshs. 250,000/= that was so excessive as to amount to an erroneous estimate of loss or damage suffered by the respondent.

6. That the learned trial magistrate erred in law and in fact in disregarding relevant evidence on record hence resulting to a wrong decision.

7. That the learned trial magistrate erred in law and fact in failing to consider the appellant's submissions and legal authorities relied upon in support thereof.

8. That the learned magistrate's decision albeit, a discretionary one was plainly wrong.

The defendant/appellant vide their written submissions denied responsibility from the resultant injury to the plaintiff/respondent. They averred that the plaintiff/respondent was issued with protective apparel on 2nd October 2009. That the plaintiff/respondent didn't require any training to feed the tea leaves into the system as he had worked for the company for 9 years, 3 of which being in the feeding section.

The appellant puts the blame squarely on the respondent for failing to exercise due diligence while working at a running machine. That the company did all it could to ensure the respondent had a safe working conditions and that all that was required of the respondent was common sense, due diligence, care and skills.

The appellant relied on the wordings of *Section 13 (1)* of the *Occupational Safety and Health Act* which states,

'(1) Every employee shall, while at the workplace—

(a) ensure his own safety and health and that of other persons who may be affected by his acts or omissions at the workplace;

(b) co-operate with his employer or any other person in the discharge of any duty or requirement imposed on the employer or that other person by this Act or any regulation made hereunder;

(c) at all times wear or use any protective equipment or clothing provided by the employer for the purpose of preventing risks to his safety and health;

(d) comply with the safety and health procedures, requirements and instructions given by a person having authority over him for his own or any other person's safety;

e) report to the supervisor, any situation which he has reason to believe would present a hazard and which he cannot correct;

(f) report to his supervisor any accident or injury that arises in the course of or in connection with his work; and

(g) with regard to any duty or requirement imposed on his employer or any other person by or under any other relevant statutory provision, co-operate with the employer or other person to enable that duty or requirement to be performed''

They submitted that liability be apportioned on a 50%:50% ratio and not 100% as held by the trial court. The appellant quoted Lord Reid in the case of ***Stapley –vs- Gypsum Mines Ltd, (2) (1953) A.C. 663*** who stated that:-

"To determine what caused the accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it…….

The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident."

As to the quantum of damages, the appellant submitted that the award of Kshs. 250,000/= was excessive.

In the case of ***Mbogo & Another – v- Shah, [1968] EA 93***, it was held that:

"An appellate court will interfere if the exercise of the discretion is clearly wrong because the Judge has misdirected himself or acted on

matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate court should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result there has been injustice."

This court elects to be guided by the said laid down principle of law as regarding appeals and more specifically as regarding interference with the award of the lower court. Chesoni Acting JA in the case of ***Stephen Muriungi and another vs. Republic (1982-88) 1 KAR 360*** held that,

"We would agree with the view expressed in the English case of Martin vs Glywed Distributors Ltd (t/a MBS Fastenings) 1983 ICR 511 that where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court (s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."

In the case of ***Sielle Vs Associated Motor Boat Company Ltd [1968] EA 123*** by *Sir Clement De Lestang*, it was held that:

> **"This court must consider the evidence, evaluate itself and draw its own conclusion though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it *appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or of the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.***

As to the quantum of damages, an appellate court ought to be reluctant in interfering with the award by the lower court unless the award is outrageously erroneous or unreasonable. This court would be guided by the finding in the case of ***Butt V Khan [1981] KLR 349*** that (per Law JA:

"**……**an appellate court will not disturb an award of damages unless it is as inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principle, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low…."

Having considered the propositions by both parties I do find that the trial court was right in finding the appellant 100% liable. It was not disputed that the conveyor belt of the machine to which the Respondent was working, was not guarded. If it had guards the belt would not have had contact with his finger, leading to the alleged injury. It is also not in dispute that the gloves he was using were torn and were not of the right material. If they were proper, most likely than not the injury would not have happened or would have been greatly reduced in extent. Evidence of negligence on part of the respondent, which would have caused the said injury was not established, hence the appellant was rightly held 100% liable. Given the sustained injury, the awarded general damages of 250,000/- was fair and adequate. There is no cause for interfering with the same. I therefore find the appeal unmerited and is hereby dismissed with costs to the Respondent.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 6th day of May

2019

In the presence of:

Mr. Kemboi holding brief for Mr. Omwenga for the appellant

Ms Sarah – Court assistant

And in the absence of Mr. Chepkwony for the respondent